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Proposals and contributions received from Governments

Philippines: position paper

1. The draft Philippine position paper on the United Nations Convention against Corruption adopts as official reference and as establishing the parameters for negotiation applicable Philippine laws and similar instruments related to graft and corruption.

2. The paper refers to relevant United Nations conventions ratified by the Government of the Philippines, as well as to documents of organizations of sovereign States, in determining the points for negotiation at the Informal Preparatory Meeting in Buenos Aires in December 2001.

3. All articles included in the draft Philippine position paper are recommended as priority areas for the Informal Preparatory Meeting in Buenos Aires in December 2001.

4. The following draft articles are proposed:

"Article 2
"Use of terms

"For the purposes of this Convention:

"(a) 'Corruption' shall mean the promising, requesting, offering, giving or accepting, directly or indirectly, of an undue advantage or prospect thereof that distorts the proper performance of any duty or behaviour required of the recipient of the bribe, the undue advantage or prospect thereof. It shall also be understood as defined in the domestic law of the State where the criminal act or omission is cited, without prejudice to provisions requiring signatory States to adopt necessary legislative or other measures to establish as criminal offences covered by this Convention certain acts of corruption:

"(i) The solicitation or acceptance, directly or indirectly, by a government official or a person who performs public functions, of any

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article of monetary value or other benefit in exchange for any act or omission in the performance of his or her public functions;

"(ii) The offering or granting, directly or indirectly, to a government official or a person who performs public functions, of any article of monetary value or other benefit in exchange for any act or omission in the performance of his or her public functions;

"(iii) Any act or omission in the discharge of his or her duties by a government official or a person who performs public functions for the purpose of illicitly obtaining benefits for himself or herself or for a third party;

"(iv) The fraudulent use or concealment of property derived from any of the acts referred to in this article; and

"(v) Participation as a principal, co-principal, instigator, accomplice or accessory after the fact or in any other manner in the commission or attempted commission of or in any collaboration or conspiracy to commit any of the above acts;

"(b) 'Plunder' means the systematic or methodical illicit enrichment of a public official of unlawful financial proceeds obtained through a series or combination of corrupt acts as defined in this Convention;

"(c) 'Public official' shall be understood by reference to the definition of 'official', 'public officer', 'mayor', 'minister' or 'judge' in the domestic law of the State in which the person in question performs the function and as applied in its criminal law;

"(d) 'Judge' referred to in subparagraph (c) above shall include prosecutors and holders of judicial offices; in the case of proceedings involving a public official of another State, the prosecuting State may apply the definition of public official only insofar as that definition is compatible with its domestic law;

"(e) 'Legal person' shall mean any entity having such status under the applicable domestic law, except for States or other public bodies in the exercise of state authority and for public international organizations;

"(f) 'Conflict of interest' occurs when a public official is a member of a board of such business or corporation, an officer or a substantial stock holder of private corporation or owner or has substantial interest in a business and the interest of such business or corporation or his or her rights or duties therein are opposed to or affected by the faithful performance of official duty.

"(g) 'Divestment' means the transfer of title or disposal of interest in property by voluntarily, completely and actually depriving or dispossessing himself or herself of his or her right or title to it in favour of a person or persons other than his or her spouse and relatives;

"(h) 'Property' shall mean assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to or interest in such assets;

"(i) 'Proceeds of crime' shall mean any property derived from or obtained, directly or indirectly, through the commission of an offence;

"(j) 'Freezing' or 'seizure' shall mean temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority;

"(k) 'Confiscation', which includes forfeiture where applicable, shall mean the permanent deprivation of property by order of a court or other competent authority.

"Article 3
"Scope of application

"This Convention shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of the offences established in accordance with relevant articles of this Convention.

"Article 4
"Protection of sovereignty

"1. States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.

"2. Nothing in this Convention entitles a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law.

"Article 5
"Corrupt practices

"1. Criminal acts

"1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

"(a) A public official demanding or accepting, either directly or indirectly, any object of pecuniary value such as a gift, promise or an undue advantage of any nature, whether for himself or herself or for another person, in exchange for an act or an omission in the discharge of his or her duties;

"(b) Offering or giving a public servant, either directly or indirectly, any object of pecuniary value such as a gift, favour or an advantage, whether for himself or herself or for another person, in exchange for an act or an omission in the discharge of his or her duties;

"(c) A public servant soliciting or receiving, either directly or indirectly, any undue advantage for himself or herself or another person in order to carry out or refuse to carry out an act in the exercise of his or her functions;

"(d) Promising, offering or giving, either directly or indirectly, any undue advantage to officials or workers in a private sector enterprise, either for themselves or for a third party, in order to induce them to carry out or to refuse to carry out an act in violation of their oath of office;

"(e) Directly or indirectly offering, giving or promising any undue advantage to any person who declares or confirms that he or she can exercise some influence on decisions or actions of persons occupying positions in the public or private sector whether the undue advantage is for himself or herself or for another person; also soliciting or receiving an offer or a promise in exchange for the influence;

"(f) Systematic or methodical illicit enrichment of a public official of unlawful financial proceeds obtained through a series or combination of corrupt acts as defined in this Convention, penalties for which may vary according to the gravity of the offence, and as may be determined by the participating States;

"(g) Failure of a public officer to explain acquisition during his or her incumbency of an amount of property that is manifestly out of proportion to his or her salary as a public official and other lawful sources of income. In which case, said property shall be presumed to have been unlawfully acquired.

"*2. Other prohibited acts*

"2. A corrupt act subject to sanctions provided for in the domestic law of each State:

"(a) Disclosure: failure of a public official either wilfully or through gross negligence to disclose accurately on an annual basis his or her assets, liabilities and net worth in order to defraud the Government of obligations such as taxes and/or deceive the proper authorities of his or her unlawful activities and proceeds;

"(b) Divestment: failure of a public official to divest applicable assets to avoid conflicts of interest to a person or persons other than his or her spouse or relatives within the fourth civil degree of consanguinity or affinity.

"*Article 7*

"*Liability of persons*

"1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in serious crimes such as plunder and for the other offences established in accordance with pertinent articles of this Convention.

"2. Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative.

"3. Such liability shall be without prejudice to the criminal liability of the natural or juridical persons who have committed the offences.

"4. Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions.

"5. Each State Party shall take the necessary measures to allow heads and other responsible officials of businesses who have knowledge of or consented to the crime or any persons having power to take decisions or exercise control within a business to be declared criminally liable in accordance with the principles defined by its national law in cases of fraud.

"*Article 8*
"*Compensation for damage*

"1. Each State Party shall provide in its domestic law for persons who have suffered damage as a result of corruption to have the right to initiate an action in order to obtain full compensation for such damage.

"2. Such compensation may cover material damage, loss of profits and non-pecuniary loss.

"3. Each State Party shall, consistent with its domestic law, provide for compensation for damages committed under the following conditions:

"(a) The defendant has committed or authorized the act of corruption, or failed to take reasonable steps to prevent the act of corruption;

"(b) The plaintiff has suffered damage; and

"(c) There is a causal link between the act of corruption and the damage.

"4. Each State Party shall provide in its domestic law that, if several defendants are liable for damage for the same corrupt activity, they shall be jointly and severally liable.

"5. Each State Party shall provide in its domestic law for appropriate procedures for persons who have suffered damage as a result of an act of corruption by its public officials in the exercise of their functions to claim for compensation from the State or, in the case of a non-State party, from that party's appropriate authorities.

"6. Each State Party shall provide in its domestic law for the compensation to be reduced or disallowed, having regard to all circumstances, if the plaintiff has by his or her own fault contributed to the damage or its aggravation.

"7. Each State Party shall provide in its domestic law for proceedings for the recovery of damage to be subject to a limitation of not less than three years from the day the person who has suffered damage became aware or should reasonably have been aware that damage has occurred or that an act of corruption has taken place and of the identity of the person responsible. However, such proceedings shall not be commenced after the end of a limitation period of not less than ten years from the date of the act of corruption.

"8. The laws of the States Parties concerned regulating suspension or interruption of limitation periods shall, if appropriate, apply to the limitation periods prescribed in this article.

"*Article 10*

"*Prosecution, adjudication and sanctions*

"1. In addition to the measures set forth in article 5 of this Convention, each State Party shall, to the extent appropriate and consistent with its legal system, adopt legislative, administrative or other effective measures to promote integrity and to prevent, detect and punish the corruption of public officials.

"2. Each State Party shall take measures to ensure effective action by its authorities in the prevention, detection and punishment of the corruption of public officials, including providing such authorities with adequate independence to deter the exertion of inappropriate influence on their actions.

"3. Each State Party shall make the commission of an offence established in accordance with articles 2 and 5 of this Convention liable to sanctions that take into account the gravity of that offence.

"4. Each State Party shall endeavour to ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for offences covered by this Convention are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences.

"5. In the case of offences established in accordance with article 5 of this Convention, each State Party shall take appropriate measures, in accordance with its domestic law and with due regard to the rights of the defence, to seek to ensure that conditions imposed in connection with decisions on release pending trial or appeal take into consideration the need to ensure the presence of the defendant at subsequent criminal proceedings.

"6. Each State Party shall ensure that its courts or other competent authorities bear in mind the grave nature of the offences covered by this Convention when considering the eventuality of early release or parole of persons convicted of such offences.

"7. Each State Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence covered by this Convention and a longer period where the alleged offender has evaded the administration of justice.

"8. Nothing contained in this Convention shall affect the principle that the description of the offences established in accordance with this Convention and of the applicable legal defences or other legal principles controlling the lawfulness of conduct is reserved to the domestic law of a State Party and that such offences shall be prosecuted and punished in accordance with that law.

"*Article 11*

"*Confiscation and seizure*

"1. States Parties shall adopt, to the greatest extent possible within their domestic legal systems, such measures as may be necessary to enable confiscation of:

"(a) Proceeds of crime derived from offences covered by this Convention or property the value of which corresponds to that of such proceeds;

"(b) Property, equipment or other instrumentalities used in or destined for use in offences covered by this Convention.

"2. States Parties shall adopt such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in paragraph 1 of this article for the purpose of eventual confiscation.

"3. If proceeds of crime have been transformed or converted, in part or in full, into other property, such property shall be liable to the measures referred to in this article instead of the proceeds.

"4. If proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to the assessed value of the intermingled proceeds.

"5. Income or other benefits derived from proceeds of crime, from property into which proceeds of crime have been transformed or converted or from property with which proceeds of crime have been intermingled shall also be liable to the measures referred to in this article, in the same manner and to the same extent as proceeds of crime.

"6. For the purposes of this article, each State Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized. States Parties shall not decline to act under the provisions of this paragraph on the ground of bank secrecy.

"7. States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law and with the nature of the judicial and other proceedings.

"8. The provisions of this article shall not be construed to prejudice the rights of bona fide third parties.

"9. Nothing contained in this article shall affect the principle that the measures to which it refers shall be defined and implemented in accordance with and subject to the provisions of the domestic law of a State Party.

"*Article 15*
"*Extradition*

"1. The criminal offences established in accordance with this Convention shall be deemed to be included as extraditable offences in any extradition treaty existing between or among States Parties. States Parties shall undertake measures to include such offences as extraditable offences in any extradition treaty to be concluded between or among them.

"2. If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it does not have an extradition treaty, it may consider this Convention the legal basis for extradition with respect to any criminal offence established in accordance with this Convention.

"3. States Parties that make extradition conditional on the existence of a treaty shall:

"(a) At the time of deposit of their instrument of ratification, acceptance, approval of or accession to this Convention, inform the Secretary-General of the United Nations whether they will take this Convention as the legal basis for cooperation on extradition with other States Parties to this Convention; and

"(b) If they do not take this Convention as the legal basis for cooperation on extradition, seek, where appropriate, to conclude treaties on extradition with other States Parties to this Convention in order to implement this article.

"4. States Parties that do not make extradition conditional on the existence of a treaty shall recognize offences to which this article applies as extraditable offences between themselves.

"5. Extradition shall be subject to the conditions provided for by the domestic law of the requested State Party or by applicable extradition treaties, including, inter alia, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition.

"6. States Parties shall, subject to their domestic law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence to which this article applies.

"7. Subject to the provisions of its domestic law and its extradition treaties, the requested State Party may, upon being satisfied that the circumstances so warrant and are urgent and at the request of the requesting State Party, take a person whose extradition is sought and who is present in its territory into custody or take other appropriate measures to ensure his or her presence at extradition proceedings.

"8. A State Party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this article applies solely on the ground that he or she is one of its nationals, shall, at the request of the State Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution. Those authorities shall take their decision and conduct their proceedings in the same manner as in the case of any other offence of a grave nature under the domestic law of that State Party. The States Parties concerned shall cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution.

"9. Whenever a State Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition

that the person will be returned to that State Party to serve the sentence imposed as a result of the trial or proceedings for which the extradition or surrender of the person was sought and that State Party and the State Party seeking the extradition of the person agree with this option and other terms that they may deem appropriate, such conditional extradition or surrender shall be sufficient to discharge the obligation set forth in paragraph 8 of this article.

"10. If extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of the requested State Party, the requested Party shall, if its domestic law so permits and in conformity with the requirements of such law, upon application of the requesting Party, consider the enforcement of the sentence that has been imposed under the domestic law of the requesting Party or the remainder thereof.

"11. Any person regarding whom proceedings are being carried out in connection with any of the offences to which this article applies shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided by the domestic law of the State Party in the territory of which that person is present.

"12. Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any one of those reasons.

"13. States Parties may not refuse a request for extradition on the sole ground that the offence is also considered to involve fiscal matters.

"14. Before refusing extradition, the requested State Party shall, where appropriate, consult with the requesting State Party to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation.

"15. States Parties shall seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition.

"16. If the corrupt act for which extradition is requested is punishable by death under the law of the requesting State party and if in respect of such crime the death penalty is not provided for by law of the requested State Party or is not normally carried out, extradition may be refused unless the requesting State Party gives such assurance as the requested State Party considers sufficient that the death penalty will not be carried out.

"17. If extradition for a criminal offence established in accordance with this Convention is refused solely on the basis of the nationality of the person sought or because the requested State Party deems that it has jurisdiction over the offence, the requested State Party shall submit the case to its competent authorities for prosecution unless otherwise agreed with the requesting State Party and shall report the final outcome to the requesting State Party in due course.

"*Article 18*

"*Joint investigations*

"States Parties shall consider concluding bilateral or multilateral agreements or arrangements whereby, in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies. In the absence of such agreements or arrangements, joint investigations may be undertaken by agreement on a case-by-case basis. States Parties involved shall ensure that the sovereignty of the State Party in whose territory such investigation is to take place is fully respected.

"*Article 23*

"*Protection of witnesses*

"1. Each State Party shall take appropriate measures within its means to provide effective protection from potential retaliation or intimidation of witnesses in criminal proceedings who give testimony concerning offences covered by this Convention and, as appropriate, for their relatives and other persons close to them.

"2. The measures envisaged in paragraph 1 of this article may include, inter alia, without prejudice to the rights of the defendant, including the right to due process:

"(a) Establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;

"(b) Providing evidentiary rules to permit witness testimony to be given in a manner that ensures the safety of the witness, such as permitting testimony to be given through the use of communications technology such as video links or other adequate means.

"3. States Parties shall consider entering into agreements or arrangements with other States for the relocation of persons referred to in paragraph 1 of this article.

"4. The provisions of this article shall also apply to victims insofar as they are witnesses.

"*1. Assistance to and protection of victims*

"5. Each State Party shall take appropriate measures within its means to provide assistance and protection to victims of offences covered by this Convention, in particular in cases of threat of retaliation or intimidation.

"6. Each State Party shall establish appropriate procedures to provide access to compensation and restitution for victims of offences covered by this Convention.

"7. Each State Party shall, subject to its domestic law, enable views and concerns of victims to be presented and considered at appropriate stages of

criminal proceedings against offenders in a manner not prejudicial to the rights of the defence.

"2. *Measures to enhance cooperation with law enforcement authorities*

"8. Each State Party shall consider providing for the possibility, in appropriate cases, of mitigating punishment of an accused person who provides substantial cooperation in the investigation or prosecution of an offence covered by this Convention.

"9. Each State Party shall consider providing for the possibility, in accordance with fundamental principles of its domestic law, of granting immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offence covered by this Convention.

"10. Protection of such persons shall be as provided for in paragraphs 1 to 4 of this article.

"*Article 26*

"*Law enforcement cooperation*

"1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. Each State Party shall, in particular, adopt effective measures:

"(a) To enhance and, where necessary, to establish channels of communication between their competent authorities, agencies and services in order to facilitate the secure and rapid exchange of information concerning all aspects of the offences covered by this Convention;

"(b) To cooperate with other States Parties in conducting inquiries with respect to offences covered by this Convention concerning:

"(i) The identity, whereabouts and activities of persons suspected of involvement in such offences or the location of other persons concerned;

"(ii) The movement of proceeds of crime or property derived from the commission of such offences;

"(iii) The movement of property, equipment or other instrumentalities used or intended for use in the commission of such offences;

"(c) To provide, when appropriate, necessary items or quantities of substances for analytical or investigative purposes;

"(d) To facilitate effective coordination between their competent authorities, agencies and services and to promote the exchange of personnel and other experts, including, subject to bilateral agreements or arrangements between the States Parties concerned, the posting of liaison officers;

"(e) To exchange information with other States Parties on specific means and methods used to engage in corrupt practices, including, where applicable, routes and conveyances and the use of false identities, altered or false documents or other means of concealing such activities;

"(f) To exchange information and coordinate administrative and other measures taken as appropriate for the purpose of early identification of the offences covered by this Convention.

"2. With a view to giving effect to this Convention, States Parties shall consider entering into bilateral or multilateral agreements or arrangements on direct cooperation between their law enforcement agencies and, where such agreements or arrangements already exist, amending them. In the absence of such agreements or arrangements between the States Parties concerned, the Parties may consider this Convention the basis for mutual law enforcement cooperation in respect of the offences covered by this Convention. Whenever appropriate, States Parties shall make full use of agreements or arrangements, including international or regional organizations, to enhance the cooperation between their law enforcement agencies.

"3. States Parties shall endeavour to cooperate within their means to respond to corrupt practices committed through the use of modern technology.

"Article 27

"Collection, exchange and analysis of information on the nature of corruption

"1. Each State Party shall consider analysing, in consultation with the scientific and academic communities, trends in corruption in its territory, the circumstances in which corruption occurs, as well as the professional groups and technologies involved.

"2. States Parties shall consider developing and sharing analytical expertise concerning corrupt practices with each other through international and regional organizations. For that purpose, common definitions, standards and methodologies should be developed and applied as appropriate.

"3. Each State Party shall consider monitoring its policies and actual measures to combat corrupt practices and making assessments of their effectiveness and efficiency.

"Article 28

"Training and technical assistance

"1. Each State Party shall, to the extent necessary, initiate, develop or improve specific training programmes for its law enforcement personnel, including prosecutors, investigating magistrates and customs personnel, and other personnel charged with the prevention, detection and control of the offences covered by this Convention. Such programmes may include secondments and exchanges of staff. Such programmes shall deal, in particular and to the extent permitted by domestic law, with the following:

"(a) Methods used in the prevention, detection and control of the offences covered by this Convention;

"(b) Routes and techniques used by persons suspected of involvement in offences covered by this Convention, including in transit States, and appropriate countermeasures;

"(c) Monitoring of the movement of contraband;

"(d) Detection and monitoring of the movement of proceeds of crime, property, equipment or other instrumentalities and methods used for the transfer, concealment or disguise of such proceeds, property, equipment, or other instrumentalities, as well as methods used in combating money-laundering and other financial crimes;

"(e) Collection of evidence;

"(f) Control techniques in free trade zones and free ports;

"(g) Modern law enforcement equipment and techniques, including electronic surveillance, controlled deliveries and undercover operations;

"(h) Methods used in combating corrupt practices engaged in the use of computers, telecommunications networks or other forms of modern technology; and

"(i) Methods used in the protection of victims and witnesses.

"2. States Parties shall assist one another in planning and implementing research and training programmes designed to share expertise in the areas referred to in paragraph 1 of this article and to that end shall also, when appropriate, use regional and international conferences and seminars to promote cooperation and to stimulate discussion on problems of mutual concern, including the special problems and needs of transit States.

"3. States Parties shall promote training and technical assistance that will facilitate extradition and mutual legal assistance. Such training and technical assistance may include language training, secondments and exchanges between personnel in central authorities or agencies with relevant responsibilities.

"4. In the case of existing bilateral and multilateral agreements or arrangements, States Parties shall strengthen, to the extent necessary, efforts to maximize operational and training activities within international and regional organizations and within other relevant bilateral and multilateral agreements or arrangements.

"*Article 29*

"*Other measures: implementation of the Convention*

"1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

"(a) (i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;

"(ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;

"(b) Subject to the basic concepts of its legal system:

"(i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;

"(ii) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.

"2. For purposes of implementing or applying paragraph 1 of this article:

"(a) Each State Party shall seek to apply paragraph 1 of this article to the widest range of predicate offences;

"(b) Each State Party shall include as predicate offences all serious crime as defined in article 2 of this Convention and the offences established in accordance with article 5 of this Convention. In the case of States Parties whose legislation sets out a list of specific predicate offences, they shall, at a minimum, include in such list a comprehensive range of offences associated with corrupt practices;

"(c) For the purposes of subparagraph (b), predicate offences shall include offences committed both within and outside the jurisdiction of the State Party in question. However, offences committed outside the jurisdiction of the State Party shall constitute predicate offences only when the relevant conduct is a criminal offence under the domestic law of the State where it is committed and would be a criminal offence under the domestic law of the State Party implementing or applying this article had it been committed there;

"(d) Each State Party shall furnish copies of its laws that give effect to this article and of any subsequent changes to such laws or a description thereof to the Secretary-General of the United Nations;

"(e) If required by fundamental principles of the domestic law of a State Party, it may be provided that the offences set forth in paragraph 1 of this article do not apply to the persons who committed the predicate offence;

"(f) Knowledge, intent or purpose required as an element of an offence set forth in paragraph 1 of this article may be inferred from objective factual circumstances.

"*Article 30*

"*Prevention of corruption*

"1. States Parties shall endeavour to establish in their domestic law a code of conduct and ethical standards for public officials and provide penalties for violations thereof. The code should require public disclosure of assets, liabilities and net worth, financial and business interests and shall commit the State to a policy of full public disclosure of all its transactions involving public interest. The State shall be allowed to verify abnormal financial transactions reported to have been undertaken by any public official or private person. The code shall also establish a system of incentives and rewards for

exemplary service and conduct based upon the observance of the norms of conduct laid down in the code.

"2. States Parties shall also endeavour to establish in their domestic law mandatory divestment requirements on the part of a public official when a conflict of interest arises.

"3. States Parties should provide mechanisms for the widest possible participation of civil society in the fight against corruption. Among such measures are the creation of community-based corruption prevention units or junior graft watch units to service as accredited private monitors. States Parties shall also provide in their domestic law for the utilization and deputization by anti-corruption agencies of any government prosecutor or private lawyer to act as special investigator or prosecutor to assist in the investigation of certain cases. Those designated and deputized to assist him or her as herein provided shall be under his or her supervision and control. In cases where a State Party's lead anti-corruption agency receives information sufficient to constitute grounds to investigate whether certain high officials of the country such as the President or the Vice-President may have violated any criminal law under its jurisdiction and where the head of that agency determines that any investigation or prosecution by him or her may result in a personal, financial or political conflict of interest, he or she shall be required to appoint an independent counsel.

"*Article 34*

"*Relations with other treaties and protocols*

"1. The present Convention repeals all preceding provisions relating to acts of corruption in all bilateral treaties existing between two States Parties.

"2. This Convention may be supplemented by one or more protocols.

"3. In order to become a party to a protocol, a State or a regional economic integration organization must also be a Party to this Convention.

"4. A State Party to this Convention is not bound by a protocol unless it becomes a Party to the protocol in accordance with the provisions thereof.

"5. Any protocol to this Convention shall be interpreted together with this Convention, taking into account the purpose of that protocol.

"*Article 38*

"*Implementation of the Convention*

"1. Each State Party shall take the necessary measures, including legislative and administrative measures, in accordance with fundamental principles of its domestic law, to ensure the implementation of its obligations under this Convention.

"2. The States Parties present during the Conference provided for in article 36 shall designate the competent body to conduct monitoring activities on the implementation of this Convention by States Parties."

Notes on specific articles

5. The following annotations may be used as a guide for the informal talks, providing the context of the discussion by the Philippine Technical Working Group per article and indicating the priorities for negotiation recommended by the Philippine delegation.

Article 2: Use of terms

6. The Philippine Technical Working Group resolved to adopt a two-pronged approach to article 2: a standard, indicative definition of "corruption" as defined in international conventions and/or treaties and characterizations or acts of "corruption" that may be covered by the proposed Convention. Article 2 of the Philippine position paper seeks to include in article 2 the term "plunder", the inclusion of which is recommended as a priority for negotiation.

Article 3: Scope of application

7. The Philippine Technical Working Group arrived at a consensus that, for the purposes of this convention, only officials holding public office are covered by the convention, without prejudice however to the involvement and/or participation of the private sector and civil society in the prevention and/or prosecution of corrupt practices as referred to in articles 2 and 5. Participation in the crime of corruption by private individuals is recognized in article 2, subparagraph (a) (i)-(v), however. For purposes of the Informal Preparatory Meeting, corruption involving the private sector and civil society shall be recommended for future discussion. However, this stance will depend on how other countries would lobby for its inclusion in the proposed convention. The Philippine Technical Working Group recommends the explicit recognition of corruption in the private sector and civil society in the preamble or statement of principles of the proposed convention.

Article 4: Protection of sovereignty

8. The Philippine Technical Working Group recommends the inclusion of "ill-gotten wealth" in the preamble or statement of principles of the proposed convention as follows:

> "While the full implementation of all the provisions of this Convention in the respective jurisdictions of all States Parties concerned is highly ideal, it will not serve as a precondition for the return of ill-gotten funds from corruption to the country of origin."

This proposal arises from the need to recognize that ill-gotten wealth constitutes part of the patrimony of a country or nation. The inclusion of this principle is recommended, as a priority for negotiation, for inclusion in the preamble or statement of principles of the proposed convention or in relevant provisions.

Article 5: Corrupt practices

9. The Philippine Technical Working Group seeks for the recognition of corrupt practices as criminal and/or prohibited acts. Such categorization acknowledges that certain acts and punishment or sanctions therefor may vary according to the nature, gravity and extent of the damage resulting from corrupt practices. Hence, some

corrupt practices may rightly be recognized as "criminal acts" and others as "prohibited acts". Under "criminal acts", two elements are further recommended for negotiation: "plunder" (subparagraph (f)) and "unexplained wealth" (subparagraph (g)). Unlike the definition of "plunder" in article 2, article 5 carries qualifications as to the amount (Philippine laws consider "plunder" to involve amounts of 1 million United States dollars) and penalties therefor, as may be determined by participating States. For the convention, no standardized amount is being contemplated or proposed herein since the amount and penalties therefor vary in developed and developing countries and these need to be determined and to be consistent with the domestic law of the sovereign States. The same principle applies for corrupt practices categorized as "prohibited acts".

Article 7: Liability of persons

10. The Philippine Technical Working Group recommends the recognition of the liability of heads and officials of businesses who have knowledge of or consented to the commission of crimes to be declared criminally liable. While similar provisions exist in documents of organizations of sovereign States, the Philippine position seeks to expand its scope to include officials, other than the heads of businesses under article 7. Clarification may be sought, however, as to which businesses are covered by this convention, although article 3 refers to "public officials" as defined in article 2. For purposes of negotiating article 7, "heads and other officials" would refer to government financial institutions, government-owned and controlled corporations, and businesses in which the Government is represented on the board, as in the case of the Philippines. Paragraph 3 includes "juridical persons" in criminal liability for offences committed.

Article 8: Compensation for damage

11. The Philippine Technical Working Group requests cognizance of the fact that sovereign States could not and should not be sued for damages arising from or as a result of the commission of corruption by public officials. This proceeds from the acknowledgement that the proceeds of corruption constitute part of the state patrimony and must be rightfully restored to it. Further awards as a result of claims for damages are monies from public coffers (i.e. taxes). It would not be just and fair for the taxpayers of any State to pay twice for crimes committed by public officials. From a more practical viewpoint, it would be opening the floodgates for the convention to recognize obligations to pay for damages on the part of sovereign States for acts of corruption by public officials. It is recommended therefore that compensation for damages should only be made by persons who have committed such crimes.

12. The Philippine Technical Working Group further recommends a discussion by the Philippine delegation, as regards cases of illicit funds that are private in nature, of whether the courts should be able to order forfeiture of such funds and proceeds of the crime and of compensation for damages in favour of rightful claimants.

Article 10: Prosecution, adjudication and sanctions

13. The proposed text of article 10 is a modified version of articles 9 and 11 of the United Nations Convention on Transnational Crime (the "Organized Crime Convention").

Article 11: Confiscation and seizure

14. The proposed text of article 11 is a modified version of articles 12-14 of the Organized Crime Convention, taking into account Republic Acts No. 1379 and 9160 of the Philippines.

Article 15: Extradition

15. The Philippine Technical Working Group requests that special attention be accorded paragraph 16 on corrupt acts punishable by the death penalty, as formulated.

Article 17: Mutual legal assistance

16. The Philippine Technical Working Group recommends that article on mutual legal assistance be deferred for further study. Points for negotiation may be recommended in formal talks for the convention. For purposes of the informal talks in Buenos Aires, however, article 18 of the Organized Crime Convention may be used as official reference for the Philippine delegation.

Article 18: Joint investigations

17. The Philippine Technical Working Group recommends the inclusion of a provision in appropriate paragraphs under article 18 to read: "States Parties should volunteer information, subject to domestic law, on a case-to-case basis".

Article 26: Law enforcement cooperation

18. The proposed text of article 26 is a modified version of articles 24 and 25 of the Organized Crime Convention.

Article 27: Collection, exchange and analysis of information on the nature of corruption

19. The proposed text of article 27 is a modified version of article 28 of the Organized Crime Convention.

Article 28: Training and technical assistance

20. The proposed text of article 28 is a modified version of articles 29 and 30 of the Organized Crime Convention.

Article 29: Other measures: implementation of the Convention

21. The proposed text of article 29 is a modified version of articles 29 and 30 of the Organized Crime Convention.